

# 2015 HOSPITALITY LAW CONFERENCE

FEBRUARY 9-11, 2015,



## The 360 Degree Legal View of a Hospitality Catastrophe

Presented by:

Marc Perry, Co-Chair, Hospitality Practice  
Group Post & Schell, P.C.

Jerry Hamilton, Managing Shareholder,  
Hamilton, Miller & Birthisel LLP

Charles Spitz, Co-Chair, Hospitality Practice  
Group, Post & Schell, P.C.

# PRESENTERS



**Marc H. Perry**  
Co-Chair & Principal, Hospitality Practice Group,  
Post & Schell, P.C.

- Experienced trial lawyer and has successfully represented members of the hospitality industry in litigation in state and federal courts.
- Tried and litigated complex premises liability, catastrophic injury and wrongful death claims on behalf of the hospitality clients, including claims for slip/trip and fall, criminal conduct of third parties on the premises, negligent security and bed bug claims.



**Charles W. Spitz**  
Co-Chair & Principal, Hospitality Practice  
Group, Post & Schell, P.C.

- Focuses his practice on representing members of the hospitality industry in a variety of legal disputes in both state and federal court.
- His clients include local and national food & hospitality companies, including hotel chains, management groups, and restaurants, as well as a variety of retail companies.



**Jerry Hamilton**  
Managing Shareholder, Hamilton, Miller & Birthisel LLP

- Trial lawyer with more than 20 years experience and managing partner of AV rated minority law firm. Recognized as one of the Top Ten Insurance Defense Lawyers in the United States by AIG, board certified by the Florida Bar, Florida Super Lawyer, Florida Legal Elite, Best of the Bar, Fellow of Litigation Counsel of America, member of Academy of Hospitality Industry Lawyers, and Florida Restaurant and Lodging Association.
- Defends premier hotels and resorts, restaurant and retail concerns, major insurers, and corporations in the areas of premises liability and negligent security, personal injury and wrongful death, medical and professional malpractice, admiralty and maritime, and product liability. Represents clients in Florida, New York, and throughout the Caribbean.



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# ACCIDENT INVESTIGATION

- Preparing for a catastrophic event is crucial to an effective response.
  - designate individuals who will conduct investigation
  - employees should be trained in appropriate materials to complete as well as what procedures to follow
  - trained in timely contacting the appropriate individuals within the company following the catastrophe
- Investigation efforts should begin immediately so as to gather evidence as soon as possible.
  - The more time that goes by, the more likely evidence will be lost
  - This investigation should include
    - (1) the immediate identification and interviewing of witnesses;
    - (2) the recording of written statements; and
    - (3) the taking of photographs. Notes should be maintained regarding the individual who took any photographs, as well as the time and date on which they were taken.



# PRESERVATION OF EVIDENCE

- The company should be sure to preserve and maintain all evidence from both before the incident and post incident.
- Failure to preserve evidence may result in sanctions during a lawsuit.
  - all evidence should be preserved even in the absence of a written request to do so.
  - case study of how much CCTV footage should be preserved
- The question of when a duty arises to preserve relevant evidence depends on the jurisdiction.
  - Reasonably foreseeable test vs. written request
  - Examples: Florida, Virgin Islands, Pennsylvania, Georgia



# EXPERTS ON SITE

- It is imperative in a casualty situation to have the appropriate experts on site as quickly as possible
  - This helps support their opinion by having an accurate evaluation of the site, as close to the condition of the incident as possible
  - Courts or juries may discredit an expert witness' opinion if the inspection was too remote in time and not performed in similar conditions
- The specific types of experts you will need will vary between situations.
- Common types of experts include: accident reconstruction, emergency response experts, human factors engineer, etc.



# INSURANCE

- Notice and Applicable Insurance
  - As soon as possible following a catastrophic event, the applicable insurance provider(s) should be identified and put on notice
  - Make sure you comply with the notice provisions contained within the insurance agreement.
- Coverage Issues
  - Before the insurance company will pay a determination of coverage must be made.
  - The laws governing coverage issues and outcomes vary from state to state, and coverage can be very dependent on where the case arises.
  - If an insurance company denies coverage and it is later determined that coverage should have been afforded, then the insurance company can be liable for bad faith and punitive damages



# INSURANCE

- Subrogation
  - If the insurance company makes a payment on behalf of the insured, then any claim the insured may have had against a negligent party passes to the insurance company.
  - The insurance company will have the right to sue the negligent party for the amount of damages which the insurance company paid to the insured
    - acts to prevent an insured from recovering a windfall, or overcompensation, by recovering both from the insurance company and a negligent third party.
  - Another situation in which subrogation may arise is where the insured is provided payments from the policy and then began proceedings against a negligent third party, ultimately recovering damages
    - . The insurer is entitled to recover from the insured the amount which was paid to the insured under the policy and for which the insured is overcompensated.





# BEST PRACTICES FOR CATASTROPHIC ACCIDENT INVESTIGATION

- In case of catastrophic accident, crucial to follow accident investigation protocol (Emergency Response Plan)
- Helps ensure company can properly defend itself against claims that may be alleged as a result of someone's catastrophic injury or even death
- The Emergency Response Plan should include establishing an effective catastrophic accident investigation team



# EMERGENCY RESPONSE PLAN

## Best Practices and Things to Consider:

- One person or even two should own the company's accident investigation activities.
- That person should follow accident investigation protocol, be trained in policies and execute the company's catastrophic accident protocol.
- The accident investigation team should be trained in knowing about the company's insurance coverage.
- All insurers that are relevant should be contacted immediately after the accident.
- Contacting the insurance company may be the most important step after catastrophic incident. Each insurance company and where policy is strict notice provisions. In essence, if the insurance company is not notified within a certain time frame after a catastrophic incident coverage may be lost.



# EMERGENCY RESPONSE PLAN

## Best Practices and Things to Consider:

- Notifying the insurer immediately will be beneficial as insurer will most likely conduct its own internal investigation and pay for costs regarding same.
- Additionally, if coverage is there for the loss, depending on the policy the insurance company will pay for the attorney and legal counsel.
- There may also be issues of subrogation to recoup money that is lost as a result of the catastrophic loss.
- Any accident response plan and/or team should involve legal counsel at an early stage.



# EMERGENCY RESPONSE PLAN

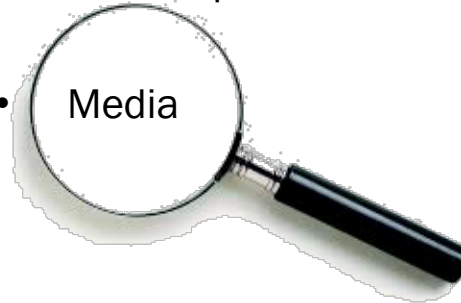
## Best Practices and Things to Consider:

- It is imperative that the target company have legal counsel consult early as a result of catastrophic injury and/or loss.
- This adds to the benefit of guidance regarding accident risk management and its help significantly legal parts and protocol (development of litigation hold or document and data destruction).
- Including legal counsel early in your accident response plan will help focus the initial investigation activities and can protect portions of the investigation from discovery if there is a lawsuit on the grounds of the attorney-client privilege or work-product doctrine.
- Have a policy in place that no employee makes any statement whatsoever without prior approval.



# FACT INVESTIGATION TEAM

- Have a fact investigation team assembled to gather information about the accident
- Investigate accident scene
- Investigate product or equipment
- Investigate injuries
- Compile documents (e-discovery, e-mails)
- Interview key witnesses
- All people where accident occurred
- First responders
- Media



# PRACTICE POINTERS

- ✓ Presume you will be the target
- ✓ Make sure no statements are made by anyone whatsoever. *Remember “loose lips sink ships”*
- ✓ Do not generate fall accident report until reviewed by attorneys. *Accident investigation reports will stick to you like glue*
- ✓ Remember accident investigation is about loss mitigation



# ISSUES RELATING TO PRIVILEGE

## Post-Accident Investigation Privilege

- After accident occurs, can you ethically claim privilege on the information obtained through your investigation.
  - Under what circumstances do incident reports become privileged?
  - When do interviews become statements?
  - Who should conduct the interviews (legal counsel to maintain privilege)?



# ISSUES RELATING TO PRIVILEGE

## Post-Accident Investigation Privilege

- Beware of trends in courts ruling that post-incident injury reports are not privilege
  - *Nelson vs. Intercontinental Hotel and Operating Corp. (2013)*
  - Court ruled that incident reports completed by employees post-accident were not protected by attorney-client privilege
  - Also rejected work-product objection
    - *“Employees prepared the incident reports in anticipation of litigation is insufficient, particularly when the employees prepare the reports in the ordinary course of business.”*
- Makes clear that just a blanket claim of attorney-client privilege or work-product will not survive the test. There has to be attorney involvement from the onset for the privileges to apply.





# USING PRIVILEGE CORRECTLY

- Both the attorney-client privilege and work-product doctrine were created to encourage companies and employers to obtain legal counsel and for clients and their counsel to engage in the type of self-critical analysis which benefits the public
- Owners and managers in companies would be understandably reluctant to brutally and self-critically exam their accidents if they believed that all of the work-product would later be used by plaintiffs to prosecute claims.
- In general, however, the attorney privilege protection is more straight forward than the concept establishing work-product protection.



# ATTORNEY CLIENT PRIVILEGE

- Generally one consultation with their counsel about current or threaten litigation or efforts to comply with the law and avoid litigation would be privileged communications.
- Certain things are not usually privileged:
  - Communications where the company is not seeking advice
  - Underlying facts,
  - Advice of aids in the commission of a crime
  - Protected information for which the client inadvertently waives protection
- More complex when conferring with in-house counsel – involvement in business may situate them more as an executive



# WORK PRODUCT DOCTRINE

- Document used to protect the materials prepared by anyone at counsel's direction and in anticipation of litigation, including work of the:
  - Employer
  - Consultants
  - Experts
  - Investigators
  - Others
- *Post-accident investigation reports prepared in catastrophic injuries are not always protected by the cloak of the work-product doctrine*
- Examples



# WORK PRODUCT DOCTRINE

- In general the essence of the work-product protection is that the work is used by attorney to provide legal counsel typically in anticipation of litigation
- The purpose for which the report is created is usually the determine of factor in deciding whether it is protected work-product
- Courts usually use the test as to whether investigative or accident reports are work-product when there are several motivating causes other than anticipated litigation for preparing them



# PRACTICE POINTERS

- ✓ Have a written policy specifying when and why post-accident investigations are conducted and reports are prepared.
- ✓ Although there are often several reasons for an investigation or for accidents in which litigation is reasonably anticipated, your written policy should expressly state that anticipation of litigation is one reason for the post-accident report
- ✓ All post-accidents reports of accidents that may lead to litigation should be directed to legal counsel.
- ✓ In-house legal counsel should direct the investigation of accidents in which litigation is reasonably anticipated. If your company does not have in-house legal counsel consider whether an accident merits hiring outside legal counsel to direct the investigation

